VIRGINIA LAW REGISTER

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Since our November number was issued Judge Cardwell has resigned from our Supreme Court, over which he has presided since the resignation of Judge Keith, for so many years President of that body. The announcement of this resignation was received with sincere regret by all members of the Virginia Bar; for Judge Cardwell has earned, as he deserved, the admiration and respect of every lawyer in the state. Courteous and considerate in manner; grave and attentive in listening to argument, the members of the profession arguing cases before his court felt that their side of the case would be heard by him without partiality or bias in the slightest degree and that every view presented would carry all the weight to which it was entitled. And more than that, they realized that Judge Cardwell had the "saving grace of common sense," which enabled him to look at the very right and justice of the matter. His opinions, to be found in Volumes 91 to 119 of the Virginia Reports, are a most valuable contribution to the jurisprudence of the Commonwealth. They exhibit painstaking care, untiring industry, the highest sense of justice and a breadth of view which reflected the strong, vigorous intellect of an able lawyer and conscientious judge. Never prolix, never too short, they are written in plain, clear English, without ambiguity and leaving no doubt as to any point decided.

Judge Richard H. Cardwell's Retirement.

We had the right to expect more years of faithful service from this distinguished jurist, who had just entered his seventieth year; for he was vigorous in mind and body. Trouble with his eyesight caused him to take the step he has taken and he now retires to a well earned repose, carrying with him the kindest wishes and sincerest regard of the whole state.

Born in 1846, he served in the Confederate Army from 1863

to 1865. In 1881 elected to the House of Delegates from old Hanover, he served with distinction several terms in that body, being elected speaker in 1887. He was a Presidential Elector in 1884—Member in 1889 of the Virginia Commission to settle the public debt, and was Chairman of the Virginia-Maryland Boundary Commission. He was elected to the Supreme Court in 1894 and twice re-elected.

For him we wish many years of contentment, health and happiness. He has served his country and the Commonwealth with loyalty, patriotism and untiring industry, and can feel now, as he lays down his arduous duties, that his countrymen appreciate all that he has done and will always admire alike the man and the jurist.

Judge R. R. Prentis.

"Had the Governor raked the state over he could not have found a better man for the Supreme Bench than Bob Prentis," said one well qualified to judge, when it was announced that Governor Stuart had chosen Hon. Robert Riddick Prentis to succeed Judge Cardwell upon the Supreme Bench.

The Editor-in-Chief does not feel that he is fit to give an impartial decision upon the merits of this appointment. For now nigh unto fifty years, he has known, admired and, may well say, loved the able lawyer, the calm, learned jurist and the high-minded honorable gentleman who has thus been selected. Friends in the most impressionable period of life—and friends continued in all life—we have watched the steady advancement of Judge Prentis from the time he began his struggle in life's hard school, knowing his worth, and confident in his success. We believe he will bring to our highest tribunal legal ability worthy of its best traditions; to its deliberations a well balanced mind with cool, strong judgment, and an integrity and desire for justice which will make him an ideal judge. He was born at the University of Virginia, May 24th, 1855. He was a son of Robert Riddick and Margaret Ann Whitehead Prentis. He is a graduate of the Eastman Business College, Poughkeepsie, N. Y., and graduated from the University of Virginia in law in 1876. In 1887 he married Mary Allen Darden, of Suffolk. He practiced law

at Charlottesville and later at Suffolk, of which latter city he was elected mayor. He also served as circuit judge in Norfolk County in 1895-1907, from which he resigned to become member of the State Corporation Commission. He was a presidential elector in 1892 and a member of the Virginia Tax Commission in 1910. He is a member of the State Advisory Board on Taxation, President of the National Association of Railroad Commissioners, a director of Lee Camp Soldiers' Home, a member of the American Bar Association and also of the Virginia State Bar Association. His home is at Suffolk, though of course he has spent much of his time in Richmond since his appointment upon the Corporation Commission.

Is a Contract Made on Sunday Void?

Amongst laymen and amongst a good many lawyers this question would be promptly answered in the affirmative, and yet a careful consideration of it will show that everything depends upon the nature of the statute in regard to Sunday observance. Of course at Common Law a contract made on Sunday was as valid as a contract made on any other day. The Lord's Day Act, 29 Car. II c. 7, enacted that no tradesman, artificer, workman, laborer, or other person whatever shall do or exercise any worldly labor *or business* (italics ours) or work of their ordinary calling upon the Lord's Day (works of charity or necessity excepted) and that every person offending should be fined, etc.

But even under this statute it was held that not every contract made on Sunday was void, but only those made in the exercise of a man's trade or ordinary calling. Thus it has been decided that a contract made on Sunday by a farmer for the hire of a laborer was valid. This decision was based upon two reasons: First, that a farmer was not a person within the meaning of the statute at all; for that the meaning of the words "tradesman, artificer, workman, laborer or other person whatsoever" was to prohibit the classes of persons named and other persons *ejusdem generis,* of a like denomination; and a farmer was not considered to be so. Second, that even if a farmer were comprehended

within the class of persons prohibited, the hiring of a servant could not be considered as *work done* in his ordinary calling.

A broker or lawyer buying a horse on Sunday has been held to be not within the tenure of a Sunday law prohibiting one to work at his ordinary calling on Sunday.

A blacksmith might do bricklaying on Sunday, or a bricklayer shoe a horse on that day, without violating the law if all Sunday statutes were framed like 29 Car. II c. 7. Our Virginia Statute, § 3799 Code, is unlike the English one in that we leave out the "ordinary calling" and provide that any person found *"laboring at any trade or calling* or employing his *apprentices or servants* in labor or *other business"* except household and other work of necessity or charity, etc., etc., shall be guilty of a misdemeanor. So any man may, under our statute, "transact any business" personally—just so he does not "labor at any trade or calling," for only the employment of apprentices or servants at "other business" constitutes the offense.

Therefore a note made on Sunday, or a contract drawn on Sunday is valid unless it is drawn by one's "apprentices or servants."

Possibly a contract drawn by a lawyer on Sunday might be held to be void, because it is within the "calling" of a lawyer to draw contracts.* But this does not apply to laymen—certainly in this state. And how about a contract drawn by a Jewish lawyer or a lawyer professing the Seventh Day Adventist Faith, who keep the seventh day as Sunday? This clearly would not be void under § 3800 of our Code.

The Circuit Court of Appeals for this district has within the present month, in a case not yet reported, decided that a contract made on Sunday was not under the Virginia Statute void—one justice dissenting. The question has never come up before our State Court of Appeals, but in the case of Raines *v.* Watson, 2nd West Va. 371, the Supreme Court of Appeals of that state has decided that the mere making of a contract on Sunday is not prohibited by the statute of West Virginia, because the making generally of contracts, without reference to particular transactions, is not a trade or calling within the meaning of the statute, and this was a case where a covenant was executed, signed,

*But will this avoid a contract signed by other parties than lawyers?

sealed and delivered on Sunday, in consideration of a release and discharge. The court held that this was not such a matter or thing as that prohibited by the statute, which prohibits the laboring at one's trade or calling on Sunday. The West Va. Statute is identical in its terms with § 3799 of our Code, and the Act approved March 21st, 1916, does not alter the language of that Section as to the prohibition.

So we believe that a contract executed on Sunday is valid in the State of Virginia.

Lien upon Stock Unaffected by the Statute of Limitations in Equity.

The case of United Cigarette Machine Company *v.* Brown, decided by our Supreme Court at its September Term, is interesting for more reasons than one. The opinion delivered by Cardwell, P., is a clear exposition of the circumstances under which a court of equity will decline to apply the Statute of Limitations to a debt which might be barred in a court of law.

Brown came into a court of equity to compel the Machine Company to pay over to him certain dividends and transfer to him certain shares of the Machine Company's stock which he declared the Company refused to pay because they asserted a lien on the stock and dividends for a debt which he claimed was barred by the Statute of Limitations and was for unliquidated damages, being for the difference between the price at which certain machines were to have been furnished to the Company and the price at which Brown had sold these machines to outsiders in violation of the contract between Brown and the Machine Company, which debt was unquestionably barred at law by the Statute of Limitations. The Machine Company filed an answer, prayed to be taken as a cross bill, setting up the fact that whilst Brown was entitled to his stock, that under the Articles of Association of the Company it had a first and paramount lien upon all shares of stock for any debts, liabilities and engagements of any stock holder holding the same, and that such lien extended to all dividends declared as such stock, which could be retained to pay any such debt, liability or engagement in re-

spect of which the lien existed. It claimed Brown was indebted to it for the difference in the price of the machines as heretofore set out. Brown demurred to the answer and cross bill, which demurrer the lower court sustained, holding *inter alia* that the claims of the Machine Company were unliquidated and barred by the Statute of Limitations, and directed a payment of $1,255.00 to Brown by the Company and enjoined and restrained it from withholding further dividends on Brown's stock or refusing to transfer his stock.

The Supreme Court reversed this decree *in toto* and held that Brown having come into a court of equity had to do equity and pay the amount claimed to be due by him to the Company before he could get his dividends and stock, the Statute of Limitations notwithstanding. Judge Cardwell in his opinion quotes *Farmer's L. & Tr. Co.* v. *Denver, etc., R. R. Co.,* 126 Fed. 46, and *Central Imp. Co.* v. *Cambrian Steel Co,* 201 Fed. 824 and 1 Penn. Eq. §§ 386-393, to sustain the view that a court of equity may condition the grant of relief sought from it by a complainant with the enforcement of the claim or equity held by the defendant, which by *reason of the Statute of Limitations* or a former judgment the latter could not enforce affirmatively or in any other way.

That this is sound justice no one can deny and as the court says, referring to Bowie *v.* Poor School, 75 Va. 300, and four other Virginia cases, the law is nowhere better settled than in Virginia that there is a very marked distinction between an action at law to recover judgment for a legal demand and a proceeding in equity to enforce an equitable lien for the same demand. The remedy at law may be barred by the Statute of Limitations, but the Statute of Limitations does not extinguish the debt, and a lien therefor may be enforced in equity, although the debt be barred.

The contention was made by Brown that the Company could not have maintained an affirmative suit in equity to enforce its lien on this stock. This contention we believe is correct. As a general rule, courts of equity follow the law in regard to Statutes of Limitation unless some equity intervenes. Wood on Limitations, § 58; Harsberger *v.* Alger, 31 Grat. 52; Story Eq. Pl., § 503.

But the Supreme Court says this was immaterial. Brown having sought the aid of a court of equity, that court had the right and it was its duty to condition any relief afforded him upon his doing equity. So Brown "went for wool" and was properly "shorn."

As to the question as to what are unliquidated damages the court refers to *Tidewater Quarry Co.* v. *Scott,* 105 Va. 160, which holds that unliquidated damages are such as rest in opinion only and must be ascertained by a jury wherein the amount settled rests in the discretion, judgment or opinion of a jury and there is no data for computation, and the damages cannot be ascertained by any mode of calculation. Damages, however, which do not lie in mere opinion, but can be readily ascertained by calculation or computation are not unliquidated. So by this standard of measurement it was quite easy to see that a simple calculation could ascertain what was due by Brown to the Company for the machines.

Judge Cardwell seems, from the language used in his opinion, to throw a doubt upon the question of setting up the Statute of Limitations as a defence in equity, by demurrer, saying: "even assuming that Appellee Brown could have made that defence by demurrer."

It is no longer an open question in Virginia that demurrer will not lie to a bill in equity the sole ground of which is the Statute of Limitations. *Hubble* v. *Poff,* 98 Va. 646, commented upon in VI Virginia Law Register, p. 557, unless there is a special limitation creating a new right. *Savings Bank* v. *Powhatan Clay Co.,* 102 Va. 274.

West Virginia, however, takes the opposite view. *Newberger* v. *Wells,* 51 W. Va. 624. *Maxwell* v. *Wilson,* 54 W. Va. 495.

Pancakes and Syrup.

The two should ever go together in "linked sweetness long drawn out," and we are glad to see that the Federal Circuit Court of Appeals in *Aunt Jemima Mills Co.* v. *Rigney & Co.,* 234 Fed. 804, has held that Aunt Jemima's syrup can continue to be used in *eo nomine* on pancakes made of Aunt Jemima's flour.

The Aunt Jemima Mills Co., when it ground under the prosaic name of Davis Milling Co., adopted the name "Aunt Jemima's" with the picture of an ancient colored lady as a trade mark for its Pancake Flour. Rigney & Co. adopted a similar name and colored lady as a trade mark for their pancake syrup. The Aunt Jemima flour protested against Aunt Jemima's syrup on the ground that it was an infringement and unfair competition. But the court said "Nay! Aunt Jemima's syrup cannot come in competition with Aunt Jemima's flour. On the contrary they have an affinity, one for the other, and differing in their descriptive qualities as much as they do, we will never prevent any one who may be so inclined from using Aunt Jemima's syrup on Aunt Jemima's pancakes," and so denied the flour any relief.

Whether the users of either or both may need relief from another branch of the learned profession is, as Kipling says, "another story."

Parol Evidence and Ambiguities.

In the case of *Connecticut Fire Ins. Co.* v. *Roberts Lumber Co.,* 89 S. E. 945, the opinion quotes from a headnote to *Home Ins. Co.* v. *Gwathmey,* 82 Va. 923, 1 S. E. 209, to the effect that in the construction of a policy of insurance there can be no resort to parol evidence except in the case of a latent ambiguity. While Judge Simms correctly quotes the headnote to the *Home Ins. Company* case, such headnote is inaccurate, and taken from a quotation from *Lorraine* v. *Tomlison,* 2 Doug. 585, cited in but not of the opinion of Judge Lacy. All that the opinion decides is, that where the policy is clear in its terms, construction is unnecessary and there can be no resort to parol evidence in aid thereof.

"Ambiguity is an uncertainty of meaning in the terms of a written instrument. There are two kinds of ambiguities: (1) A latent ambiguity, where the writing appears on the face of it certain and free from ambiguity, but the ambiguity is introduced by evidence of something extrinsic, or by some collateral matter; (2) A patent ambiguity, which is the ambiguity apparent on the face of the instrument itself. *Brown* v. *Guice,* 46 Miss. 299, 302. There is at the present day no real difference

in the rules of law governing patent and latent ambiguities. Ambiguities, both patent and latent, may be explained by evidence of extrinsic facts. See Graves on Extrinsic Ev., p. 30." Questions & Answers to Bar Examinations (1913-1915), p. 6. While the courts frequently distinguish between latent and patent ambiguities in regard to the admissibility of parol or extrinsic evidence to aid construction, Professor Graves in his article on Extrinsic Evidence, read before the Virginia Bar Association, 1893, and printed in 14 Va. Law Reg. 913, clearly points out the error thereof. When an insurance policy or any other writing is ambiguous whether patent or latent, the courts may resort to construction by applying certain fixed rules and by resorting to such aids as may be helpful to them, many of which aids are extrinsic. See 1 Va. Law Reg., N. S., 512.

The rule permitting the introduction of parol or extrinsic evidence to aid the construction of a writing is entirely different from the rule forbidding the introduction of parol evidence to vary or contradict it. What is meant by the former is that the court, when in doubt, may seek aid from matters extrinsic to the writing itself, and by the latter that, when the parties to a contract have reduced it to writing, such writing is alone evidence of their agreement and cannot be contradicted or varied by evidence of another prior or simultaneous contract. There is absolutely no connection between the two, and it is unfortunate that the two should be confused. Construction is the determination of the meaning of the parties, expressed by the writing itself, and not the varying of such writing nor the setting up of an independent agreement, which is forbidden by the parol evidence rule. It is interesting, if not amusing, to note that in the opinion to the Connecticut Fire Ins. Company case, Judge Simms speaks of parol evidence to aid the construction of a policy, while the headnote in the Southeastern Advanced Sheets speaks of "the parol evidence rule."

T. B. B.